

4DD Holdings, LLC v. USA & Immix Technology

9/6/2017

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1 P R O C E E D I N G S

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3 (Proceedings called to order, 10:33 a.m.)

4 THE COURT: -- your end?

5 MR. GILMORE: Yes, I'm joined by my colleagues,
6 Ed Meyers and Pat Cipollone.

7 COUNSEL: Good morning, Your Honor.

8 THE COURT: Good morning.

9 And Mr. Todor?

10 MR. TODOR: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. TODOR: It's just me.

13 THE COURT: All right. And for Immix, Ms.
14 Lord?

15 MS. LORD: Yes, I'm here. Good morning, Your
16 Honor.

17 THE COURT: Good morning. Thank you for
18 joining us.

19 All right. I think today was just a followup
20 on maybe -- what was it, a status conference, or I can't
21 remember if we're dealing with any motions the last time
22 we got together about a month ago, but there were a lot
23 of activities in play. And y'all had lots of chores you
24 were working on. And I assume today's a good day to
25 report back on that.

1 So you want to begin, Mr. Gilmore?

2 MR. GILMORE: Thank you, Your Honor. And, yes,
3 I think initially we thought we would be just reporting
4 on the status, but there's several disputes, one that's
5 time-sensitive, that we think we needed -- really needed
6 to discuss with Your Honor today. The two issues that I
7 think are pressing, one is the Government's last-minute
8 and unwarranted effort to limit the questioning of Mr.
9 Calvin, who we are scheduled to depose tomorrow.

10 THE COURT: And who is he?

11 MR. GILMORE: The second -- I'm sorry?

12 THE COURT: Who is Mr. Calvin?

13 MR. GILMORE: David Calvin was the project
14 engineer and the contracting officer's representative.
15 He is a -- I think an important witness, and he is the
16 person who has submitted now three declarations
17 regarding the number of installs and the circumstances of
18 installs of the TETRA software. We discussed his
19 deposition at the August 9th hearing with Your Honor.
20 Your Honor had ordered at that hearing that the
21 Government supplement its response to address on all of
22 the installs and provide accounts of those installs,
23 including partial installs or unconfigured installs for
24 the TETRA software.

25 THE COURT: (Inaudible).

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1 MR. GILMORE: We were supposed to take --

2 THE COURT: Hang on.

3 MR. GILMORE: Sure.

4 THE COURT: You're talking about supplementing
5 interrogatories or production or what?

6 MR. GILMORE: Talking -- supplementing the
7 Government's interrogatory responses in advance of the
8 deposition. And at that point on August 9th, we were
9 to -- were scheduled to take Mr. Calvin's deposition on
10 August 28th. Now, what happened --

11 THE COURT: And has that supplementation taken
12 place?

13 MR. GILMORE: Well, we received it last Monday.
14 We learned on Thursday -- the Thursday before his Tuesday
15 deposition, that the Government wouldn't have any
16 information from him until the Monday before his Tuesday
17 deposition, nor was the Government able to tell us when
18 they'd be producing additional documents. And Mr. Todor
19 suggested that we postpone his deposition and postpone
20 the entire case schedule by four months.

21 We said we were not willing to postpone
22 the case schedule by four months. We did agree to
23 postpone his deposition by one week so that we would
24 receive the information that you had ordered the
25 Government to produce, not the night before his

1 deposition, but, you know, sufficient time to digest and
2 analyze it.

3 We then said to Mr. Todor, why don't we have an
4 in-person meet-and-confer, since we're not going to be
5 deposing Mr. Calvin on Tuesday, August 28th; let's have
6 an in-person meet-and-confer and just hash through all of
7 these discovery issues and try to get some firm
8 commitments.

9 We met with Mr. Todor on that Tuesday, covered
10 a lot of issues, made progress on some issues, but
11 notably Mr. Todor was not able to commit to when they
12 would even start producing, let alone finish producing
13 the additional documents -- additional custodian
14 documents that we had asked for way back in July, now a
15 month and a half. Haven't received a single document for
16 any of those people.

17 And then to get to this issue, we then received
18 an email from him the day after that meet-and-confer,
19 where Mr. Todor indicates that the Government would seek
20 to limit the questioning of Mr. Calvin at his deposition
21 unless the Plaintiffs supplement their answers to
22 interrogatories. This is the first time -- Mr. Todor had
23 not raised that issue at either of the hearings we had in
24 July or August in front of Your Honor or at our in-person
25 meet-and-confer the day before.

1 THE COURT: Well, let's -- hang on. What is it
2 that from your perspective might have triggered a need to
3 supplement your answers?

4 MR. GILMORE: We don't know. I mean, and we've
5 answered -- the interrogatory answer that he's seeking
6 supplementation on is the same issue that we've been
7 discussing, which is what is the -- what's the number of
8 TETRA installs that the Plaintiffs are contending. We
9 answered that almost a year ago in a detailed answer. We
10 identified what we believe were in excess of 45,000
11 copies and identified documentation that we had found
12 from the production thus far that we believed supported
13 that.

14 And, you know, so we think that we've given,
15 frankly, more information in a more detailed response
16 than the Government has answered on a topic that, of
17 course, you know, the Government should be the ones in
18 possession of that information and should be the ones
19 providing the detailed response. It's the topic that
20 we've gone to and discussed with -- you know, at
21 multiple conferences with Your Honor, and the
22 Government knows is one of the main reasons why we
23 wanted to take Mr. Calvin's deposition early. And now
24 the --

25 THE COURT: All right. What is the proposed

1 limitation on Calvin's subject matter? Back to Mr.
2 Gilmore.

3 MR. GILMORE: Well, they -- what Mr. Todor has
4 said is that they would limit us to only questioning
5 about the Government's authorization and consent of SMS
6 installing TETRA software in its SMS lab environment.

7 THE COURT: Okay. And why do you want to go
8 beyond that?

9 MR. GILMORE: Well, Your Honor, we want to take
10 -- we want to be efficient. We want to take a deposition
11 of Mr. Calvin on all topics that are relevant to this
12 case, and we want to question him about his declarations
13 and the interrogatory responses and documents that bear
14 on those declarations and interrogatory responses that he
15 verified that get to the number of installs of -- or
16 uninstalls, partial installs, of the software everywhere,
17 in the Government's testing centers as well as in the SMS
18 lab. And other --

19 THE COURT: Hang on. Do the declarations go to
20 the question of the number of installs?

21 MR. GILMORE: They do. We don't think they --
22 we think they raise more questions than they answer, but
23 that is the topic. And those declarations and the
24 interrogatory answers were not limited to just the issue
25 of authorization or consent on installs in the SMS lab.

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1 THE COURT: Okay. So what's the second
2 disputed issue?

3 MR. GILMORE: The second disputed issue is that
4 we need a commitment from the Government as to when they
5 will substantially complete production of documents from
6 additional custodians and when they will make available
7 to us data that we've been seeking at least since January
8 -- the hard drives that contain whatever data was -- is
9 supposedly still preserved, still in existence from the
10 Richmond Development Testing Center.

11 And we have been pursuing that, and the
12 Government has given us images that we cannot access, and
13 we've gone back to the Government multiple times. The
14 Government still has not been able to make that data
15 available to us. I don't know, and I'm not going to
16 speculate as to the reasons why, why, but we're being
17 prejudiced because it's data that is plainly relevant.
18 It's data that we've been seeking for months, and we
19 still don't have access to it.

20 And we don't think that it's -- it's something
21 that we raised at the last hearing on August 9th with
22 Your Honor. We think it's important because one of the
23 issues that we've discovered is that the Government
24 decommissioned the Data Testing Center in 2015, we think
25 after we had filed this lawsuit, which raises real issues

1 of evidence preservation. They've said that all they've
2 been able to identify as remaining from the Richmond Data
3 Development Testing Center are the contents of these hard
4 drives. And, you know, we're two years into this case,
5 and we still haven't been able to access and review that
6 information.

7 THE COURT: Okay. Other than the two disputed
8 issues, is there anything else that you need to sort of
9 fill in the gaps for me, from the last time we've met?

10 MR. GILMORE: Well, I mean, I can report KSJ
11 produced documents. We've gotten deposition dates for
12 some of the additional custodians, although those are the
13 custodians from whom we don't have their -- I'm sorry, we
14 have deposition dates for some of the additional
15 Government witnesses, and we are working on several other
16 third-party document issues that we've made some progress
17 on. So, yeah, we're moving ahead.

18 I am, you know, though -- Mr. Todor has
19 indicated that he's given us dates for the additional
20 custodians as well, but I think the need to have firm
21 commitments, when the Government is going to produce
22 documents and when it's going to provide the data I think
23 drives what's happening in this case. And we don't think
24 that we can -- we should be forced to extend the schedule
25 once again.

1 You know, we asked at the meet-and-confer we
2 had with Mr. Todor on -- that they produce the documents
3 for these additional custodians by September 30th. And
4 Mr. Todor said to us that that was a reasonable date,
5 that was the date that he would ask for if he were us,
6 but he couldn't commit to that date.

7 Well, you know, we suggested that maybe if the
8 Court ordered the Government to produce documents, to
9 make substantial completion of its production by date
10 certain that that might motivate Mr. Todor's clients.
11 And we think that that's what the Court should do at this
12 point. We don't have any more information from Mr. Todor
13 that they are going to be able to produce documents by
14 September 30th, and so we think that the Government
15 should order the Government to -- that the Court should
16 order the Government to do that.

17 THE COURT: Remind me, is the production
18 limited to the -- production request and discovery
19 limited strictly to the authorization and consent
20 question?

21 MR. GILMORE: It's not, and the Government has
22 been producing documents, and we've been exchanging
23 written discovery requests and responses on all the
24 topics related to the case. So it has not -- discovery
25 has not been bifurcated, and the Government has not been,

1 you know, treating its document production in that
2 manner.

3 And we think that that's appropriate. I mean,
4 it would be inefficient, frankly, to try and tease out
5 and separate out the -- what might relate on
6 authorization consent from every other issue. The issues
7 in this case are really -- you know, pretty inextricably
8 intertwined in that regard.

9 THE COURT: Well, remind me, based on your best
10 recollection, walking through it all over again, but what
11 was it that the Government offered in its motion to
12 dismiss to, in effect, satisfy a burden to demonstrate
13 that there was no authorization and consent? I'm again
14 asking the Plaintiff.

15 MR. GILMORE: Your Honor, from our read, the
16 Government seems to very heavily rely on what we think is
17 a self-serving presentation from the contractor, SMS,
18 that SMS gave to the Government while it was in the midst
19 of bidding on the recompetes for the contract. So it had
20 every incentive to tell the Government what the
21 Government wanted to hear. And --

22 THE COURT: Well, forgetting the motivation for
23 a minute, what does it amount to? What -- if SMS's
24 information is credited, what would it amount to?

25 MR. GILMORE: Well, the presentation from

1 January 2015 claims that the Government had not
2 authorized SMS to produce -- to install copies in the SMS
3 lab. We've found lots of contrary evidence,
4 contemporaneous correspondence predating that
5 presentation, where -- that we believe -- and we intend
6 to question witnesses about -- that show the Government
7 knowing what SMS was doing in the lab, moving the
8 contents of the DTC into the SMS lab because the
9 Government testing center wasn't adequate for the work
10 that needed to occur on the contract.

11 And so the Government telling SMS do the work
12 in your lab, and the Government making available to SMS
13 the TETRA software for use in the SMS lab, I mean, at the
14 same time -- in those same communications indicating that
15 the Government knows that it needs to keep track of how
16 many copies are being made.

17 We actually asked Mr. Todor to consider
18 withdrawing the motion to dismiss because we're sure he's
19 aware of those documents, particularly if he's preparing
20 Mr. Calvin for his deposition. And we don't think that
21 there's a valid basis for the motion. And the motion is
22 artificially driving scheduling issues and scheduling
23 problems. The close of discovery --

24 THE COURT: Hang on, hang on a second.

25 MR. GILMORE: Sure.

1 THE COURT: That's, frankly, my concern. I'm
2 wondering if we need to not strictly as an alternative
3 but simultaneously perhaps get your response as best
4 you're able to on the motion to dismiss to decide whether
5 or not we need to get rid of that as an irritant in the
6 discovery process. I mean, if you're satisfied that
7 you've got enough to preclude dismissal at this point,
8 I'm wondering if that wouldn't be the best thing to do,
9 is to resolve the motion to dismiss and then that way we
10 wouldn't have the distraction of the argument that this
11 doesn't relate to authorization and consent.

12 And at this point, I guess I'll -- well, let
13 me continue with the Plaintiff for a minute. How long
14 would it take you to put together a response based on
15 what you currently have on the motion to dismiss? Or
16 does that require pursuing some of the currently ongoing
17 discovery?

18 MR. GILMORE: So, Your Honor, under the current
19 schedule, our response is due January 3rd to the motion.

20 THE COURT: Oh, I see. I'd already given you a
21 due date, I see, okay. Well --

22 MR. GILMORE: And the discovery relating to the
23 -- it's called, I guess, jurisdictional discovery,
24 related to that motion, is supposed to be concluded by
25 December 1st.

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1 THE COURT: I see.

2 MR. GILMORE: Plenary discovery closed
3 August -- I'm sorry, April. And, so, you know, we
4 think even with the delays, particularly if Your Honor
5 spurs the Government by telling them, well, commit to
6 certain -- a time table for production, commence with a
7 time table for making the hard drives available, we
8 think that we can -- we'll certainly, on our end, do
9 everything we need to make the April discovery deadline,
10 but we're -- you know, we're looking at this schedule
11 for the motion to dismiss, and we just don't -- you
12 know, we don't want to be prejudiced by not having,
13 you know, the depositions of witnesses so that we know,
14 you know, and will present, you know, all the right
15 evidence to Your Honor on why their motion -- if the
16 Government's going to consider pursuing it, on why their
17 motion fails.

18 THE COURT: Well, I guess what I need to have a
19 better understanding of is to what extent is the ongoing
20 discovery -- has it sort of jumped the traces into
21 generalized discovery relating to liability or damages or
22 whatever. Are we well beyond authorization and consent
23 in terms of interrogatories and document production?

24 MR. GILMORE: Yes, Your Honor. I mean, I think
25 Mr. Todor's got to agree. We're well beyond that. We

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1 haven't limited our production. The third parties
2 haven't limited the production. And except for one third
3 party, SMS, no other third party I'm aware of has
4 bifurcated their discovery.

5 And the Government has -- and, frankly, you
6 know, we don't think that SMS should have. And the
7 Government hasn't bifurcated its discovery, production or
8 documents, or responses to interrogatories. In fact, the
9 response that the Government, you know, claims we think
10 is without merit, that we need to supplement, doesn't
11 have to do -- it's certainly not limited to authorization
12 and consent. It has to do with the whole thing.

13 THE COURT: Okay. Hang on.

14 MR. GILMORE: So no one is treating -- sure.

15 THE COURT: Mr. Gilmore, are you on a speaker
16 phone?

17 MR. GILMORE: I am, Your Honor.

18 THE COURT: Okay.

19 MR. GILMORE: Are you having a hard time
20 hearing me? I apologize. I'll try and talk --

21 THE COURT: No, I'm not having a hard time
22 hearing you. I'm having a hard time interrupting you, I
23 guess, is the point.

24 MR. GILMORE: Oh. I apologize. I don't mean
25 to -- I'm sorry, I don't mean to talk over you, Your

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1 Honor. I apologize for that.

2 THE COURT: No, it can't be helped, I guess,
3 with the speaker phone.

4 All right. Let's shift to the Government for a
5 minute. Anything you need to address in terms of your
6 assessment of where we are with each other?

7 MR. TODER: Yes, Your Honor. And just to
8 clarify a few things Plaintiff's counsel said, with
9 respect to Mr. Calvin's deposition, at our status
10 conference on August 9th, the Court directed us to have
11 Mr. Calvin state to his knowledge the number of
12 nonfunctional or partial installs. We sent that to
13 Plaintiffs on August 28th. They have that. They have
14 the number that Mr. Calvin is aware of.

15 After that, we met with Plaintiff's counsel the
16 next day, where they were talking about the discovery
17 issues they had. During that conversation, it became
18 clear to me that the real focus of what they were going
19 to be asking Mr. Calvin about was not the authorization
20 and consent issue for jurisdictional discovery for which
21 the deadline is December 1st; it was the number of
22 installs in the DTC environment, which isn't even an
23 issue in the motion to dismiss.

24 And then I looked at their interrogatory
25 responses, especially their supplemental interrogatory

1 response from October of 2016, where they said that they
2 were looking at documents and they intended to supplement
3 their response with respect to the number of installs,
4 the very same time topic for which they demanded that Mr.
5 Calvin provide, you know, now three declarations. And
6 they never have supplemented their response.

7 This would be crucial information for
8 refreshing the witness' memory, and as the Court has
9 noted, the December 1st deadline, it's for jurisdictional
10 discovery. It's not for general discovery. The only
11 time urgency for Plaintiffs, if they feel they need to
12 take depositions to respond to our motion to dismiss,
13 relates to the authorization and consent issue. It
14 doesn't relate to these other issues.

15 That's why I sent the letter -- I sent them a
16 letter last Wednesday, the day after we met, saying, you
17 know, please supplement your interrogatory response with
18 what you know in a week, and given that they feel that
19 they're prepared to depose Mr. Calvin on this topic,
20 presumably they've identified the documents they think
21 that bear on the question and they think they have the
22 answers in their mind. Their mind's been sharpened on
23 the issue, sent out within the week, they refused to do
24 so.

25 I also had previously suggested that as the

1 Court has heard, Plaintiffs have raised a number of new
2 document discovery-type issues. They're asking again for
3 new document custodians, which their first request came
4 in September of 2016, responses completed by May -- by
5 the end of April 2016. They had that full response --
6 250,000 documents -- in their possession for over three
7 months.

8 Then they come out with new -- another list of
9 custodians, some of which are, you know, one is a very
10 senior official who's no longer with the Government, is
11 on a completely different email system, and now they're
12 coming to the Court saying that they're going to be
13 prejudiced if we don't complete that in two months when
14 the previous production took seven months and there was
15 no motion to compel there.

16 Again, the only time urgency is on the
17 authorization and consent issue. They are seeking to
18 take basically general discovery depositions of -- in all
19 of these witnesses before they complete their own
20 disclosure. And that's the other issue that I raised
21 with Plaintiffs that Plaintiffs didn't mention to the
22 Court. In my letter last Wednesday, I told them and I
23 discussed this with them at the -- our in-person
24 conference last Tuesday, that the Plaintiffs issued a
25 huge number of third-party subpoenas, to different

1 companies.

2 We have not gotten Plaintiff's production
3 from all of those. They sent one round of subpoenas,
4 I believe, July 2016. We haven't gotten any production
5 from one company, T4. From SMS, the company at issue
6 in the authorization and consent, we don't have a
7 record of anything other than the documents that were
8 actually filed with the Court, even though SMS did make a
9 limited production on the authorization and consent
10 issue.

11 And, furthermore, Plaintiffs sent another round
12 of approximately ten subpoenas this January. They didn't
13 even mention those, asking -- they were just asking
14 whether we had received the productions. They didn't
15 actually state whether they had made the production.
16 They didn't even mention those other companies as ones we
17 should even check on, so I don't even know what their
18 status is on the second round of subpoenas.

19 Again, in order to have a proper chance to
20 prepare our witnesses for deposition, the Plaintiffs are
21 intending on introducing a document from a third-party
22 subpoena, it should have been produced to us and for us
23 to have the opportunity to review it beforehand.
24 Plaintiffs can't even tell us whether they got the
25 documents or not.

1 All of these, you know, document issues -- both
2 old document issues and new ones Plaintiffs are, you
3 know, trying to relitigate, such as the DTC hard drives,
4 I've been asking Plaintiffs since March in what form they
5 want the Government to produce it. I never got a
6 response on that, so I just went ahead and produced it on
7 my own in May. They said they had trouble accessing it
8 because of the encryption. I went back to the client. I
9 sent the information that they had. Plaintiffs said they
10 still couldn't access it. I went back to them, but,
11 again, we produced it in the way it was kept by the
12 client.

13 Any implication that the Government is engaged
14 in any kind of deliberate delay is completely unfounded.
15 We're trying to produce and meet our responsibilities,
16 and we gave the declaration that the Court instructed to
17 have the witness provide.

18 All of those reasons are why I had suggested to
19 Plaintiffs either we complete all of these discovery
20 issues that they're bringing -- some of which are new,
21 some of which have been lingering -- and then we can
22 move to depositions; or, if they're not going to do
23 that, we limit the questioning on the depositions
24 that are happening between now and December 1st to
25 the authorization and consent issue because that's the

1 only issue for which Plaintiffs need to have discovery
2 in order to file their response to our motion to
3 dismiss. The rest can be done in general discovery
4 after everyone has completed all of their document
5 production.

6 THE COURT: Okay, a number of issues. First of
7 all, on the third-party subpoenas, tell me how that
8 process works. Mr. Gilmore, you send a subpoena to a
9 third party; they furnish information to you. Does the
10 Government get access to any of that?

11 MR. GILMORE: Your Honor, our understanding of
12 the process, as it unfolded and as it has unfolded since
13 we've come onto the case, the Government was given an
14 opportunity to review the productions of all of the
15 third-party subpoena documents and assert the level of
16 confidentiality that the Government needed, that it
17 believed that those documents warranted. And during that
18 interim period, I think the Government had, like, 30
19 days. During that interim period, we maintained all the
20 documents as attorneys' eyes only.

21 So it was our understanding that the Government
22 was at the same time, you know, we were seeing was
23 reviewing all of these productions. So were taken aback
24 by Mr. Todor's assertion that he doesn't have copies of
25 the documents that the third parties produced. But when

1 he raised that again for the --

2 THE COURT: So -- hang on, hang on.

3 MR. GILMORE: Sure.

4 THE COURT: What was the -- what was the
5 instructions to the third party in the subpoena? Were
6 they supposed to make copies and give one set to the
7 Government and one set to the Plaintiff? Or did
8 everything get funneled through the Government, or did
9 everything get funneled through the Plaintiff? I'm
10 asking Plaintiff.

11 MR. GILMORE: Well, Your Honor, I'm sorry, I'm
12 not sure that I can answer that exactly the process --
13 what we were informed by prior counsel was that the
14 productions were made available to the Government and the
15 Government asserted confidentiality designations and
16 we've seen that happening. The precise mechanics I'm not
17 aware of. Since we've come onto the case, the
18 productions that we've received from third parties,
19 we've, I think, is one, right, the KSJ documents we've
20 made available, the same -- at the same time that we
21 received it from KSJ. So

22 THE COURT: Is there any current third-party
23 production request outstanding?

24 MR. GILMORE: There are, and we identified in
25 the correspondence that we sent to Mr. Todor last week

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1 the entities from whom we've received document
2 production. We're still in the process of pursuing
3 several others who have yet to produce or we're still
4 working through the parameters of their production.

5 But this is -- again, this is not something
6 that we had heard from Mr. Todor before --

7 (Whereupon, at 11:03 a.m., the audio file ends
8 abruptly.)

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1 CERTIFICATE OF TRANSCRIBER

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3 I, Sara J. Vance, court-approved transcriber,
4 certify that the foregoing is a correct transcript from
5 the official electronic sound recording of the
6 proceedings in the above-titled matter.

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10 DATE: 9/14/2017

s/Sara J. Vance

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SARA J. VANCE, CERT

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